



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue
Seattle, WA 98101

Reply To
Attn Of: RA-140

Honorable Senator Gordon H. Smith
United States Senate
One World Trade Center
121 SW Salmon Street,
Suite 1250
Portland, Oregon 97204

Re: In the matter of: Robert E. Kerivan and Bridgeview Vineyards, Inc.
EPA Docket No. CWA-10-2005-0124

Dear Senator Smith:

This responds to your letter dated May 2, 2007, concerning Robert Kerivan's response to my letter to you dated March 27, 2007, concerning the EPA enforcement action brought against Mr. Kerivan and Bridgeview Vineyards, Inc. In his letter to you dated April 19, 2007, Mr. Kerivan states that EPA ignored Clean Water Act (CWA) exemptions and general authorizations when it filed the enforcement action in 2005. Mr. Kerivan also states that there were two erroneous statements on p.2 of my March 27th letter. For the following reasons, EPA disagrees with Mr. Kerivan's assertions.

During negotiations concerning this matter from 2002-2005, EPA enforcement staff considered and rejected arguments made by Mr. Kerivan's attorneys that the CWA Section 404(f)(1) agricultural exemptions applied to the unauthorized discharges that occurred at the Bridgeview Winery. Mr. Kerivan's attorneys were unable to convince either EPA or the U.S. Army Corps of Engineers (Corps) that any CWA 404(f)(1) exemption applied to the unauthorized discharges. His attorneys presented no evidence that his activities met the conditions described in 40 C.F.R. § 232.3(c)(2) and (6) for the maintenance of serviceable structures and construction and maintenance of farm road exemptions to apply. Further, EPA and the Corps considered and rejected Mr. Kerivan's argument that Nationwide Permit (NWP) 13 concerning bank stabilization applied to his fill activity. EPA disagrees with Mr. Kerivan's statement concerning the amount of fill material used to create a channel to divert the flow of the creek from his bank and NWP 13 specifically states that it cannot be used for the channelization of waters of the U.S. See 67 *Fed. Reg.* 2080 (January 15, 2002). See enclosed excerpt from the 2002 Federal Register. Further, Portland District Regional Condition (j) Bank Protection (also

enclosed) requires that the permittee notify the District Engineer in accordance with NWP general condition #13 for any activity that includes bank stabilization. Mr. Kerivan's attorneys presented no evidence that he provided the requisite notification. Mr. Kerivan has no basis for reasserting defenses that were discussed and rejected during settlement negotiations. By signing the Consent Agreement and Final Order, he specifically waived his right to contest the settlement of the enforcement action, including the scope of EPA's CWA jurisdiction over the subject property.

As for the first erroneous statement Mr. Kerivan claims EPA made in its letter, Mr. Kerivan states that the Illinois River is not a navigable-in-fact water body because it is not contained in the Corps list of navigable riverways within the state of Oregon he attached as Exhibit A. But it appears that the list in Exhibit A refers to riverways that the Corps regulates under Section 10 of the Rivers and Harbors Act of 1899, not to navigable waters that are regulated under Section 404 of the CWA. When considering the term "navigable waters," Corps regulations specifically distinguish the authorities that apply under the Rivers and Harbors Act of 1899 from those that apply under the CWA. See 33 C.F.R. § 328.1. The terminology used by Section 404 of the CWA includes "navigable waters" which is defined in Section 502(7) of the Act as "waters of the United States including the territorial seas. Corps regulations define "waters of the United States" to include "intrastate lakes, rivers, streams (including intermittent streams...) which are or could be used by interstate or foreign travelers for recreational or other purposes..." 33 C.F.R. § 328.3(a)(3). EPA regulations contain a similar definition at 40 C.F.R. § 232.2. For a number of years, the Illinois River has been used for such recreational activities as white water rafting. See attached Internet advertisement. Based on this fact, EPA continues to assert that the Illinois River is not only navigable-in-law, it is also navigable-in-fact within the meaning of the CWA.

As for the second erroneous statement Mr. Kerivan attributes to EPA, EPA has never claimed that it did not issue interim guidance concerning the Rapanos decision. As indicated in the March 27th letter, Ms. Hilsman informed Mr. Kerivan that EPA had not issued *final* guidance on the implementation of the Rapanos decision. As reflected on page 2 of Mr. Kerivan's Exhibit B, at the time the EPA interim guidance was distributed internally, various EPA offices were in the process of studying the Rapanos opinions and EPA intended to issue guidance on how to proceed in light of the decision. Such final guidance will provide EPA's interpretation of the decision. That final guidance has not yet been issued. Meanwhile, EPA and the United States Department of Justice have filed several briefs describing the Rapanos decision and its implementation in specific cases and the government's interpretation of the decision is far different from Mr. Kerivan's and his attorney's. In a brief filed on March 16, 2007, the U.S. Department of Justice described Rapanos as involving two consolidated cases in which the Supreme Court construed the CWA term "waters of the United States" in instances where the CWA has been applied to pollutant discharges into wetlands adjacent to nonnavigable tributaries of traditional navigable waters. A copy of the brief is enclosed with this letter which not only provides a synopsis of the Rapanos decision (see p.5 – 6), also provides citation to case law in which courts have rejected claims that prior settlements or convictions must be set aside based on a subsequent Supreme Court decision. See p. 9 – 11. As indicated on p. 5 of the brief (minus references to the citations), all Members of the Court reaffirmed that the term "waters of

the United States” encompasses some waters, including wetlands, that are not navigable in the traditional sense; four Justices interpreted the term as covering “relatively permanent, standing or continuously flowing bodies of water,” that are connected to traditional navigable waters; Justice Kennedy interpreted the term to encompass wetlands that “possess a ‘significant nexus’ to waters that are or were navigable in fact or that could reasonably be so made;” and the four dissenting Justices concluded that the term encompasses, inter alia, all tributaries and wetlands that satisfy either the plurality’s standard or that of Justice Kennedy.

In this instance, EPA continues to assert that Sucker Creek is a “relatively permanent, standing or continuously flowing body of water connected to a traditional navigable water and that Sucker Creek has a significant nexus to the Illinois River and that Sucker Creek remains subject to CWA jurisdiction under the Rapanos decision. EPA sees no basis for setting aside the Consent Agreement and Final Order filed in January 2006 and has no intention of returning the penalties Mr. Kerivan paid by agreement.

Finally, in Mr. Kerivan’s second April 19, 2007 letter to you, he refers to a state court injunction issued against the Oregon Division of State Lands. Enclosed is a copy of the Oregon State Court of Appeals decision that reversed the earlier Josephine County Circuit Court decision enjoining the Oregon Division of State Lands. As indicated on p.16 of the decision, the State Court of Appeals found that Mr. Kerivan and his company failed to demonstrate that any of the exemptions under the Oregon fill and removal law applied.

I trust that this responds to your questions concerning this matter. If you or your staff has any other questions concerning this matter, then please contact Ms. Hilsman at 206-553-1810.

Sincerely,

Elin D. Miller, Regional Administrator
U.S. Environmental Protection Agency, Region 10

Enclosures`

cc w/enc: Robert Kerivan

I trust that this responds to your questions concerning this matter. If you or your staff has any other questions concerning this letter, then please contact Ms. Hilsman at 206-553-1810.

Sincerely,

/s/

Elin Miller, Regional Administrator
U.S. Environmental Protection Agency, Region 10

Enclosure

cc w/enc: Robert Kerivan

bcc w/o enc: Michel Rodriquez, EPA
Deborah Hilsman, EPA
Michael Szerlog, EPA
Yvonne Vallette, EPA

CONCURRENCE			
Name			
Initials			
Date			